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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

HARRIS L. WINNS,

Plaintiff,

V.

BLAKELY SOKOLOFF TAYLOR & ZAFMAN, LLP, ANTHONY INTIL, CANDY MIELKE, JIM SALTER, MICHAEL MALLIE, JOHN P WARD, ED TAYLOR, DAN DEVOS, DIANE ROBSON, LESTER VINCENT STEVE ZELMAN, DAVE MONTOYA, KAREN WILSON, TAREK FAHMI, LAURA E. INNES, RONALD F. GARRITY, CHARLES WALL

Defendants.

CASE NO.: C08 02622 JW

**DEFENDANTS' NOTICE OF MOTION
AND SPECIAL MOTION TO STRIKE
PLAINTIFF'S COMPLAINT PURSUANT
TO CALIFORNIA CIVIL PROCEDURE
CODE §425.16**

[Rule 12(b)(6) Motion to Dismiss Filed Concurrently Herewith]

Date: September 15, 2008

Time: 9:00 am

Dept.: Courtroom 8, 4th Floor

Judge: James Ware

TO PLAINTIFF HARRIS L. WINNS:

PLEASE TAKE NOTICE that on September 15, 2008 at 9:00 a.m. or as soon thereafter as the matter may be heard in Department 8 of the above entitled court located at 2112 Robert F. Peckham, Federal Building, United States Courthouse, 280 South First Street, San Jose, California, 95113-3002, Telephone: (408) 535-5364, Defendants Blakely Sokoloff Taylor & Zafman, LLP, Anthony Intil, Candy Mielke, Michael Mallie, John P. Ward, Ed Taylor, Dan Devos, Diane Robson, Lester Vincent, Jim Salter, Dave Montoya, Tarek Fahmi, Steve Zelman, and Karen Wilson (“Defendants”) will and hereby do move to strike Plaintiff Harris L. Winns’ (“Plaintiff”) causes of

1 action for Malicious Prosecution and Abuse of Process in the Complaint on file herein pursuant to
 2 California Civil Procedure Code § 425.16.

3 Defendants further request this Court order Plaintiff to pay the attorney's fees and costs
 4 incurred by Defendants in making this motion in an amount to be determined after the Court's
 5 decision upon the submission of further briefing and evidence.

6 This special motion to strike is made on the grounds that Plaintiff's causes of action for
 7 Abuse of Process and Malicious Prosecution arise from Defendants' valid exercise of the
 8 constitutional right to petition which is protected by the First Amendment to the United States
 9 Constitution, Article I of the California Constitution and by the litigation privilege. Since
 10 Plaintiff's causes of action for Abuse of Process and Malicious Prosecution arise from Defendants'
 11 litigation-related and petitioning activity and because Plaintiff cannot possibly establish a
 12 probability of success on his claims, the anti-SLAPP statute requires the dismissal of Plaintiff's
 13 causes of action for Abuse of Process and Malicious Prosecution against all Defendants.

14 This motion to strike is brought pursuant to California Code of Civil Procedure § 425.16.
 15 This motion to strike is based upon this notice, the memorandum of points and authorities, the
 16 Declaration of Cortney L. McDevitt, and Defendants' Request for Judicial Notice and exhibits
 17 thereto, all served and filed concurrently herewith, as well as on all pleadings, records, and
 18 documents on file with the court in this action, and on all such oral and documentary evidence and
 19 arguments of counsel as may be presented at the hearing on this motion.

20 Dated: Friday, August 15, 2008

STRAZULO FITZGERALD LLP

23 By _____
 24 Nancy L. McCoy
 25 Cortney L. McDevitt
 26 Attorneys for Blakely Sokoloff Taylor & Zafman,
 27 LLP, Anthony Intil, Candy Mielke, Michael
 Mallie, John P. Ward, Ed Taylor, Dan Devos,
 Diane Robson, Lester Vincent, Jim Salter, Dave
 Montoya, Tarek Fahmi, Steve Zelman, and Karen
 Wilson

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

HARRIS L. WINNS,
Plaintiff,
v.
BLAKELY SOKOLOFF TAYLOR &
ZAFMAN, LLP, ANTHONY INTIL, CANDY
MIELKE, JIM SALTER, MICHAEL MALLIE,
JOHN P WARD, ED TAYLOR, DAN DEVOS,
DIANE ROBSON, LESTER VINCENT
STEVE ZELMAN, DAVE MONTOYA,
KAREN WILSON, TAREK FAHMI, LAURA
E. INNES, RONALD F. GARRITY, CHARLES
WALL
Defendants.

CASE NO.: C08 02622

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEFENDANTS' SPECIAL MOTION TO
STRIKE PURSUANT TO CALIFORNIA
CIVIL PROCEDURE CODE §425.16**

[Rule 12(b)(6) Motion to Dismiss Filed
Concurrently Herewith]

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I. INTRODUCTION

On February 14, 2002, Defendant Blakely, Sokoloff, Taylor & Zafman (“BSTZ”) terminated Plaintiff Harris Winns’ (“Winns”) employment following a verbal altercation between Winns and a co-worker. A few months later, BSTZ, through its attorneys Simpson, Garrity & Innes, PC, sought and obtained a temporary restraining order and then a stipulated injunction against Winns. On May 23, 2008, Winns filed the current lawsuit against 16 defendants, alleging causes of action based on his termination and the subsequent litigation.

Winns' Complaint in this action alleges causes of action for Malicious Prosecution and Abuse of Process arising out of the temporary restraining order and stipulated injunction. These causes of action trigger California's Code of Civil Procedure § 425.16 ("§ 425.16"), the anti-SLAPP (Strategic Lawsuits Against Public Participation) statute, because they arise directly from BSTZ's petitioning conduct. Winns will not be able to meet his burden of showing a probability of success regarding these causes of action. The claims are defectively pled, and BSTZ's allegedly unlawful conduct is absolutely protected by the litigation privilege. Therefore, BSTZ's motion should be granted and Defendants should be awarded their costs and attorney's fees incurred with this motion.

II. STATEMENT OF FACTS

Winns worked for BSTZ from February 2000 until his termination on February 14, 2002. BSTZ terminated Winns' employment after Winns was involved in a verbal altercation with a co-worker.

On April 9, 2002, BSTZ sought a temporary Workplace Violence Restraining Order against Winns on April 9, 2002 based on its belief that Winns had trespassed several times on BSTZ's property, misappropriated BSTZ's confidential and privileged information, and destroyed thousands of BSTZ's documents after he was terminated. See Request for Judicial Notice in Support of Motion to Strike ("Request for Judicial Notice") ¶ 1. BSTZ and Winns entered into a Stipulated Order for Injunction on May 13, 2002, set to expire by its own terms on April 30, 2005. Request for Judicial Notice, ¶ 2.

1 Winns filed his Complaint on May 23, 2008. In his Complaint, Winns appears to allege
 2 that BSTZ terminated his employment and sought a restraining order against him based on his race.
 3 Winns further alleges that he has been unable to obtain employment, unable to get an apartment,
 4 and has suffered economically and emotionally as a result of his termination and as a result of the
 5 restraining order issued against him. Winns appears to be alleging causes of action for racial
 6 discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 1981, 42 U.S.C. §
 7 1985(3), intentional infliction of emotional distress, wrongful termination against public policy,
 8 malicious prosecution and abuse of process against all named Defendants.

10 III. LEGAL ANALYSIS

11 A. Statutory Authority

12 California Civil Procedure Code Section 425.16 establishes a procedure for bringing a
 13 special motion to strike lawsuits that are brought primarily to “chill” the valid exercise of the
 14 constitutional rights of freedom of speech and petition for the redress of grievances. Civ. Proc.
 15 Code §425.16(a); Kibler v. Northern Inyo County Local Hosp. Dist. (2006) 39 Cal.4th 192, 197.
 16 Section 425.16, provides: “A cause of action against a person arising from any act of that person in
 17 furtherance of the person’s right of petition or free speech under the United States or California
 18 Constitution in connection with a public issue shall be subject to a special motion to strike, unless
 19 the court determines that the plaintiff has established that there is a probability that the plaintiff will
 20 prevail on the claim.” Civ. Proc. Code §425.16(b)(1).

21 An “act in furtherance of a person’s right of petition or free speech . . .” includes any written
 22 or oral statement made before a legislative, executive, or judicial body, or any other official
 23 proceeding authorized by law, or in connection with an issue under consideration by such body or
 24 in such proceeding. Civ. Proc. Code § 425.16(e)(1) & (e)(2). “When the defendant’s alleged acts
 25 fall under the first two prongs of section 425.16, subdivision (e) (speech or petitioning before a
 26 legislative, executive, judicial, or other official proceeding, or statements made in connection with
 27 an issue under review or consideration by an official body), the defendant is not required to

1 independently demonstrate that the matter is a ‘public issue’ within the statute’s meaning.” Navarro
 2 v. IHOP Properties, Inc. (2005) 134 Cal.App.4th 834, 842-843; *see, also,* Briggs v. Eden Council for
 3 Hope & Opportunity (1999) 19 Cal.4th 1106, 1113, 1123. Additionally, the defendant is not
 4 required either to demonstrate that it was the plaintiff’s intent to chill the defendant’s speech or
 5 petitioning rights or to demonstrate that the plaintiff’s claim actually had a chilling effect on the
 6 exercise of such rights. Equilon Enterprises, LLC v. Consumer Cause, Inc. (2002) 29 Cal.4th 53,
 7 City of Cotati v. Cashman (2002) 29 Cal.4th 69, 74-76.

8 The anti-SLAPP statute expressly mandates that the statute “shall be construed broadly.”
 9 Civ. Proc. Code §425.16(a); Dowling v. Zimmerman (2001) 85 Cal.App.4th 1400, 1410. Nothing
 10 in the anti-SLAPP statute categorically excludes any particular type of cause of action from being
 11 stricken pursuant to its provisions. Navellier v. Sletten (2002) 29 Cal.4th 82, 92. The focus of the
 12 anti-SLAPP statute is not the form of plaintiff’s cause of action, but rather it is on the defendant’s
 13 activity that gives rise to his asserted liability and whether that activity constitutes protected speech
 14 or petitioning. Id.

15 To decide an anti-SLAPP motion, Section 425.16 requires the trial court to undertake a two-
 16 step process. Kashian v. Harriman (2002) 98 Cal.App.4th 892, 906. First, the court must decide
 17 whether the defendant has made a prima facie showing that the acts of which the plaintiff
 18 complains were taken in furtherance of the defendant’s rights of petition or free speech. Id. In
 19 other words, the defendant must show that the act underlying the plaintiff’s cause of action fits one
 20 of the categories contained in Section 425.16(e). Navellier, supra, 29 Cal.4th at 88.

21 Second, if the defendant meets its burden, the burden shifts to the plaintiff to show a
 22 probability of prevailing on the claim. Id. “In order to establish the necessary probability of
 23 prevailing, [a] plaintiff [is] required both to plead claims that [are] legally sufficient, and to make a
 24 prima facie showing, by admissible evidence, of facts that would merit a favorable judgment on
 25 those claims, assuming plaintiff’s evidence were credited.” 1-800 Contacts, Inc. v. Steinberg (2003)
 26 107 Cal.App.4th 568, 584. Further, to meet his or her burden in opposing the motion, “a plaintiff
 27 cannot simply rely on its pleadings, even if verified, but must adduce competent, admissible

1 evidence.” Roberts v. Los Angeles County Bar Assn. (2003) 105 Cal.App.4th 604, 614).

2 In ruling on an anti-SLAPP motion, the plaintiff’s complaint is analyzed as it is. The fact
 3 that a complaint might be amended to state a claim is disregarded. Premier Medical Management
 4 Systems, Inc. v. California Ins. Guarantee Assn. (2006) 136 Cal.App.4th 464, 476 (in ruling on an
 5 anti-SLAPP motion, the court must take the complaint as it is). “If the pleadings are not adequate
 6 to support a cause of action, the plaintiff has failed to carry his burden in resisting the motion.”
 7 Gilbert v. Sykes (2007) 147 Cal.App.4th 13, 31. Since the anti-SLAPP statute makes no provision
 8 for amending the complaint, if the motion is granted, the plaintiff is not entitled to leave to amend
 9 the claim. Simmons v. Allstate Ins. Co. (2001) 92 Cal.App.4th 1068, 1073-1074.

10 B. **Winns’ Causes Of Action Arise Directly From Defendants’ Acts In Furtherance**
 11 **Of Their Right Of Petition And Thus Are Subject To A Special Motion To**
 12 **Strike Under The Anti-SLAPP Statute.**

13 The first step in the analysis is to determine whether the claim at issue “arises from”
 14 protected activity. Civ. Proc. Code §425.16(b). For this step, “the critical consideration is whether
 15 the cause of action is *based on* the defendant’s protected free speech or petitioning activity.”
 16 Navellier, supra, 29 Cal.4th at 89 (emphasis in original); *see, also*, Kolar v. Donahue, McIntosh &

17 Hammerton (2006) 145 Cal.App.4th 1532, 1537 (a claim ‘arises from’ an act when the act forms the
 18 basis for the plaintiff’s cause of action). Filing a lawsuit or seeking administrative action is an
 19 exercise of one’s constitutional right of petition and any statements made in connection with
 20 litigation “arise from” protected activity under section 425.16. Ludwig v. Superior Court (City of
 21 Barstow (1995) 37 Cal.App.4th 8, 19 (“any act ... in furtherance of the ... right [to] petition The
 22 constitutional right to petition . . . includes the basic act of filing litigation”); Briggs, supra, 19
 23 Cal.4th at p. 1115. To be subject to the anti-SLAPP statute, it is necessary only that the
 24 communication bear “some relation” to the lawsuit. A.F. Brown Elec. Contractor, Inc. v. Rhino
 25 Elec. Supply, Inc. (2006) 137 Cal.App.4th 1118, 1126.

26 Here it is clear that Winns’ causes of action for Malicious Prosecution and Abuse of Process
 27 arise from petitioning activity. Winns’ factual allegations relating to these causes of action pertain
 28 only to obtaining a temporary restraining order and stipulated injunction against him. Accordingly,

1 BSTZ's activities in pursuing the restraining order against Winns fall squarely within the plain
 2 language of the anti-SLAPP statute. Navarro, *supra*, 134 Cal.App.4th at 843. Since BSTZ's
 3 alleged acts constitute petitioning activities, Defendants are not required to demonstrate that the
 4 matter is a "public issue" under Section 425.16. Briggs, *supra*, 19 Cal.4th at 1113, 1123.
 5 Defendants therefore have satisfied their burden under the anti-SLAPP statute analysis.

6 **C. Winns Cannot Establish A Probability Of Success With Respect To His Claims**
 7 **Against Defendants.**

8 Since all of Winns' claims for Malicious Prosecution and Abuse of Process arise from
 9 BSTZ's actions in furtherance of petitioning activity, the burden will shift to Winns to show that he
 10 can establish a probability of success with respect to these claims. BSTZ incorporates by reference,
 11 as if fully set forth herein, BSTZ's 12(b)(6) Motion to Strike to Winns' Complaint in its entirety
 12 filed concurrently herewith. As is shown in BSTZ's Motion to Dismiss, all of Winns' claims
 13 against BSTZ, including Winns' claims for Malicious Prosecution and Abuse of Process are barred
 14 by the doctrine of res judicata, barred by the applicable statute of limitations, or fail to state a claim
 15 upon which relief may be granted. Thus, Winns will not be able to meet his burden. *See, Philipson*
 16 & *Simon v. Gulsvig* (2007) 154 Cal.App.4th 347, 361-364 (Plaintiff cannot show a probability of
 17 success where allegations are insufficient to constitute a cause of action); *Vogel v. Felice* (2005)
 18 127 Cal.App.4th 1006, 1017 (plaintiff cannot show a probability of success where claim is legally
 19 insufficient on its face).

20 **D. Defendants Are Entitled To Recover Their Attorney's Fees And Costs**

21 Consistent with the legislative intent behind the statute, Section 425.16(c) provides "a
 22 prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's
 23 fees and costs." Civ. Proc. Code § 425.16(c). Defendants request that, should they prevail on this
 24 motion, the Court order the payment of their attorney's fees and costs, subject to the submission of
 25 supporting documents and proof regarding the fees and costs incurred.

1
2 **IV. CONCLUSION**
3

4 For the foregoing reasons, Defendants Blakely Sokoloff Taylor & Zafman, LLP, Anthony
5 Intil, Candy Mielke, Michael Mallie, John P. Ward, Ed Taylor, Dan Devos, Diane Robson, and
6 Lester Vincent, Jim Salter, Dave Montoya, Tarek Fahmi, Steve Zelman, and Karen Wilson request
7 that the court grant their special motion to strike in its entirety. Further, Defendants request that the
8 Court award Defendants their attorney's fees and costs associated with this motion.
9

10 Date: August 15, 2008

STRAZULO FITZGERALD, LLP

11 By _____
12

13 Nancy L. McCoy
14 Cortney L. McDevitt

15 Attorneys for Blakely Sokoloff Taylor & Zafman,
16 LLP, Anthony Intil, Candy Mielke, Michael
17 Mallie, John P. Ward, Ed Taylor, Dan Devos,
18 Diane Robson, and Lester Vincent, Jim Salter,
19 Dave Montoya, Tarek Fahmi, Steve Zelman, and
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